IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR BEDROSIAN,	)	
	)	
Plaintiff,	)	Case No. 2:15-cv-05853
	)	
v.	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER

AND NOW, this ___ day of ____________, 2017, upon consideration of plaintiff's motion to permit the use of deposition testimony from otherwise available witnesses, and defendant's opposition thereto, it is hereby ORDERED that plaintiff's motion is GRANTED. Plaintiff shall be permitted to introduce designated portions of the deposition testimony of IRS witnesses John West, Michael Enz, and Pamela Christensen as evidence at trial. Defendant shall be permitted to introduce counter-designations of the deposition testimony for the same witnesses.

BY THE COURT:

____

MICHAEL M. BAYLSON, U.S.D.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR BEDROSIAN,	)	
	)	
Plaintiff,	)	Case No. 2:15-cv-05853
	)	
v.	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF ARTHUR BEDROSIAN'S MOTION
TO PERMIT THE USE OF DEPOSITION TESTIMONY AT TRIAL

Plaintiff Arthur Bedrosian hereby moves the Court, pursuant to Fed. R. Civ. P. 32 (a)(3), Fed. R. Civ. P. 32(a)(4)(E), and/or Fed. R. Evid. 801(d)(2)(D) to permit plaintiff to introduce the testimony of three Internal Revenue Service witnesses obtained during discovery in these proceedings, even if such witnesses would be otherwise available to testify at trial. In support thereof, plaintiff relies upon the attached memorandum of law, which is incorporated herein by reference.

Respectfully submitted,

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Date: August 18, 2017

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR BEDROSIAN,	)	
	)	
Plaintiff,	)	Case No. 2:15-cv-05853
	)	
v.	)	
	)	
UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF ARTHUR BEDROSIAN'S MOTION TO PERMIT THE USE OF DEPOSITION TESTIMONY AT TRIAL

Plaintiff Arthur Bedrosian hereby moves the Court, pursuant to Fed. R. Civ. P. 32 (a)(3), Fed. R. Civ. P. 32(a)(4)(E), and/or Fed. R. Evid. 801(d)(2)(D) to permit plaintiff to introduce the deposition testimony of three Internal Revenue Service witnesses obtained during discovery in these proceedings, even if such witnesses would be otherwise available to testify at trial.

I. INTRODUCTION/BACKGROUND

Plaintiff instituted this action for illegal exaction after defendant imposed a penalty for plaintiff's purported willful violation of 31 U.S.C. § 5314. Plaintiff seeks the return of his partial payment of the penalty and defendant has filed a counterclaim seeking the balance of the penalty assessed plus interest and other penalties.

During discovery, plaintiff deposed the following Internal Revenue Service ("IRS") witnesses: Coordinator for Programs and Special Projects John West ("West"), Acting Chief Headquarters Policy Governmental Liaison Michael Enz ("Enz") and Supervisory Revenue Agent Pamela Christensen ("Christensen"). West, Enz, and Christensen were all involved in the IRS audit and review of Plaintiff's tax returns and FBAR reports during the relevant time period. Each of them had interactions with Mr. Bedrosian, and/or his representative during this time.

Their testimony is relevant to Mr. Bedrosian's state of mind and thus highly relevant to the issue before the Court. Defense counsel for the IRS represented each of these IRS witnesses at their depositions. All three are still currently employed by the IRS.

In an attempt to expedite the trial proceedings, plaintiff designated certain portions of the depositions of West, Enz, and Christensen for use at trial. *See* Doc. No. 42 (Plaintiff's Deposition Designations), attached hereto as Exhibit A. Pursuant to the Court's Final Pretrial Order (Doc. No. 34), defendant has the opportunity to counter-designate portions of these depositions if it so chooses. Defendant has indicated to plaintiff that it objects to the use of any deposition testimony from these three witnesses because they are not "unavailable" for trial, as that term is defined in the Federal Rules. Plaintiff now moves for an Order permitting the use of these depositions pursuant to Fed. R. Civ. P. 32(a)(3) and/or Fed. R. Civ. P. 32(a)(4)(E) or, in the alternative, pursuant to Fed. R. Evid. 801(d)(2)(D).

The Court should grant plaintiff's motion because: (i) the relief requested is appropriate under the law, (ii) it would streamline trial and conserve judicial resources, and (iii) the deposition testimony is relevant to determining plaintiff's state of mind and thus highly relevant to the issue before the Court.

II. ARGUMENT

A. The Testimony Should Be Admitted Under Fed. R. Civ. P. 32(a)(3)

"An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)." Fed. R. Civ. P. 32(a)(3); *see also Redd v. New York State Div. of Parole*, 923 F. Supp. 2d 393, 408 (E.D.N.Y. 2013). In *Redd*, the defendant asked the court to deny certain of the plaintiff's deposition designations, arguing, *inter alia*, that the witnesses were available to testify at trial. *Id.* The court denied the motion, holding that Rule 32(a)(3) is "liberally construed," and the Court "may not refuse to allow the deposition to be used merely because the party is available to testify in person." *Id.*, (citing *N. Ins. Co. of N.Y. v. Albin Mfg., Inc.*, No. 06-cv-190(S), 2008 WL 328582, at *3 n.4 (D.R.I. Aug. 8, 2008)); *see also* 8A Wright et al., *Federal Practice and Procedure* § 2145 (2d ed. 2008).

The term "managing agent" is not defined within the Federal Rules of Civil Procedure. However, courts in this district regularly apply a three part test to make this determination: is the individual (1) invested with power to exercise his discretion and judgment in dealing with corporate matters, (2) can they be depended upon to carry out an employer's direction to give required testimony, and (3) do they have an alignment of interests with the corporation rather than one of the other parties. *See M.F. Bank Restoration Co. v. Elliott, Bray, & Riley, et al.*, 1994 WL 8131, at *2 (E.D. Pa. Jan. 11, 1994); *Philadelphia Indem. Ins. Co. v. Federal Ins. Co.*, 215 F.R.D. 492, 494 (E.D. Pa. 2003). While "[t]here is no rigid rule on how to apply the above-mentioned test … the third part is considered critical." *M.F. Bank Restoration Co.*, 1994 WL 8131, at *3. "The question of who is a managing agent is highly fact-specific and so it is to be answered 'pragmatically' and on an 'ad hoc' basis … [e]ven lower-level employees may qualify as managing agents for purposes of the rules of discovery where those employees' 'duties and activities are closely linked with the events giving rise to the lawsuit.'" *Atmosphere Hospitality Mgmt., LLC v. Curtullo*, 2015 WL 136120, at *9, 13-14 (D.S.D. Jan. 9, 2015).

Here, it is overwhelmingly apparent that West, Enz, and Christensen all have an alignment of interests with the defendant as opposed to the plaintiff, thereby satisfying the third factor. As for the other factors, all three witnesses had the ability to exercise their discretion and judgment in dealing with the FBAR investigation. Christensen is a supervisory revenue agent for the Special Enforcement Program and has been with the IRS for thirty-eight years. *See* Christensen Deposition at p. 7:12-14; p. 8:4-6 (attached hereto as Exhibit B), Enz is the Acting Chief Headquarters Policy Governmental Liaison in the Privacy Governmental Liaison in the Disclosure Division and has been with the IRS for twenty-eight years. *See* Enz Deposition at p. 7:5-7; 12-15 (attached hereto as Exhibit B). In fact, it was Christensen's decision in conjunction with Enz to re-open the investigation of plaintiff after it had concluded and the file was set to be closed with a non-willful determination. *See* Christensen Deposition at p. 21 ("A. And it becomes my case when he gives it back to me, and from my determination the penalty was understated. Q. So rather than close the file you decided to basically do your own review and you came to a different conclusion? A. Yes"). West has been with the IRS for twelve years and works as a coordinator for Programs and Special Projects, sending information to revenue agents in the field to be worked. *See* West Deposition at p. 10:9-12 (attached hereto as Exhibit B). All of these witnesses function in a supervisory, coordination, or management capacity for the IRS, and all of them have many years of experience.

As to whether or not these witnesses can be depended upon to give the required testimony, they have already been deposed in this case in their capacities as IRS representatives. Answering this inquiry "pragmatically" as the Court must, it is clear that all three witnesses had sufficient autonomy and responsibility to be considered managing agents. Indeed, West, Enz, and Christensen all stand in stark contrast to those who have been found not to be managing agents, such as secretaries and stenographers or railroad conductors. *See Colonial Capital Co. v. General Motors Corp.*, 29 F.R.D. 514, 515 (D. Conn. 1961); *Seaboard Coastline R. Co. v. Hughes*, 521 S.W.2d 558, 562 (Tenn. 1975).

B. The Testimony Should Be Admitted Under Fed. R. Civ. P. 32(a)(4)(E)

"The decision whether or not to allow the use of a deposition at trial …. is within the discretion of the trial court." *Flores v. NJ Transit Rail Operations, Inc.*, 1998 WL 1107871, *3 (D. N.J. 1998). Fed. R. Civ. P. 32(a)(4)(E) allows a party to move for the use of a deposition at trial when "exceptional circumstances make it desirable – in the interest of justice and with due regard to the importance of live testimony in open court …." Fed. R. Civ. P. 32(a)(4)(E).

Here, requiring plaintiff to call West, Enz and Christensen for live testimony would constitute a significant waste of time and judicial resources. Plaintiff's examination of these witnesses would essentially be a carbon copy of the questions posed during their deposition, when they were under oath and represented by capable counsel who had the opportunity to cross-examine them and in fact did cross-examine all three of these witnesses. *See* Exhibit C (cross-examination of West); Exhibit D (cross-examination of Enz) and Exhibit E (cross-examination of Christensen).

Defendant has filed a motion *in limine* seeking to preclude plaintiff from introducing any argument, testimony, or evidence of the IRS investigation of Mr. Bedrosian in part because it would "cause undue delay [and] waste time …" and claims that plaintiff seeks to turn what should be a one-day trial into a multi-day trial. *See* Doc. No. 43-1, at p. 11. Plaintiff agrees that this trial should take no more than 1-2 days. The best way to accomplish this is not by uniformly precluding all evidence of the underlying investigation that gives rise to this litigation, but by permitting the use of the very deposition transcripts to which defendant has objected. The opportunity to designate and counter-designate the relevant portions provides a fair opportunity to admit this testimony and avoids the inevitable multiplication of time that would result from calling them live, potential impeachments, and cross-examination. Ironically, defendant is insisting that plaintiff call live witnesses while simultaneously accusing plaintiff of wasting time and unnecessarily delaying trial.

C. The Testimony Should Be Admitted Under Fed. R. Evid. 801(d)(2)(D)

In the alternative, the depositions of West, Enz, and Christensen should be admitted under Fed. R. Evid. 801(d)(2)(D), which provides: [a] statement that meets the following conditions is not hearsay: [t]he statement is offered against an opposing party and was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed.” Fed. R. Evid. 801(d)(2)(D).

Courts have held that “Rule 32 is not the exclusive means by which depositions can be admitted and that Rule 801(d)(2)(D) is an independent basis for admissibility.” *In Re Hayes Lemmerz Int’l., Inc., et al.*, 340 B.R. 461, 468-69 (Bankr. D. Del. 2006). In *In Re Hayes Lemmerz Int’l.*, GECC sought to introduce the depositions of various Hayes employees who also testified live at the trial and Hayes objected, arguing that the depositions did not satisfy the Rule 32 criteria because they were being used substantively, the witnesses were not officers/directors/managing agents, and they were available to testify. *Id.* at 468. Furthermore, GECC did not provide Hayes with notice of its intent to use the deposition transcripts. *Id.* GECC argued that the depositions are admissible under 801(d)(2)(D) and that deposition testimony otherwise admissible under this rule “should not be excluded simply because the witness is available.” *Id.*, citing *Island Sav. Bank, F.S.B. v. United States*, 63 Fed. Cl. 157, 163-64 (Fed. Cl. 2004) (holding that Rule 801(d)(2)(D) and Rule 32 provide independent grounds for admissibility of deposition testimony); *Globe Sav. Bank, F.S.B. v. United States*, 61 Fed. Cl. 91, 95-96 (Fed. Cl. 2004) (same). The court concluded that 801(d)(2)(D) did in fact provide an independent basis for admissibility and, because “the testimony relates to areas covered by the deponents' employment" it was therefore admissible under 801(d)(2)(D); *see also Paich v. Nike, Inc.*, No. 06-1442, 2008 WL 2763613, at *2 (W.D. Pa. July 11, 2008) (finding that plaintiff would be able to offer as evidence statements contained in deposition excerpts of available witnesses and that, "as long as those statements are, in fact, admissions made by a party opponent in conformance with Federal Rule of Evidence 801(d)(2)(D), they may be admissible" but that a final determination would have to await trial).

Furthermore, courts have found "ample authority to allow statements as admissions by a party opponent in the appropriate context involving the Government …" despite the general principle that an agent of the government generally cannot bind the government, specifically in the criminal context. *See* In *Re Jacoby Airplane Crash Litig.*, No. 99-6073, 2008 WL 2746833, at *5 (D. N.J. Sept. 19, 2007) (collecting cases where deposition testimony, statements, and reports of government personnel were admissible as an admission of a party opponent).

Here, the testimony plaintiff seeks to admit was clearly on matters within the scope of West, Enz, and Christiansen's employment with the IRS. Because 801(d)(2)(D) provides "an independent basis" for admissibility beyond Rule 32, plaintiff should be permitted to offer the designated excerpts from the deposition transcripts as evidence at trial.

III. CONCLUSION

Plaintiff should be permitted to introduce the deposition testimony of these three IRS witnesses who qualify as managing agents under Fed. R. Civ. P. 32(a)(3). Doing so would expedite an orderly trial of these proceedings and alleviate defendant's concerns about delay or waste of time. Alternatively, plaintiff should be permitted to introduce these depositions under Fed. R. Evid. 801(d)(2)(D).

Respectfully submitted,

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Date: August 18, 2017

CERTIFICATE OF SERVICE

I, Beth L. Weisser, hereby certify that the foregoing Plaintiff's Motion to Permit the Use of Deposition Testimony at Trial was served by ECF, upon the following:

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/s/ Beth L. Weisser
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Date: August 18, 2017